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No. 759

In the Supreme Court of the United States

October Term, 1955.

Joe McMullans, M. R. Edwards and R. W. Pate, *Petitioners*,

vs.

Kansas, Oklahoma and Gulf Railway Company, Incorporated; and Local No. 408 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association; and J. E. Farrell, Chairman, W. B. Moore, Vice-Chairman, and F. E. Daniel, Secretary of the Committee of the said Brotherhood of Locomotive Firemen and Enginemen, and as representatives of all of the employees of the class coming within the scope of the collective bargaining agreement between said Railway Company and the said Brotherhood, *Respondents*.

Petition for Writ of Certiorari

To the United States Court of Appeals for the Tenth Circuit.

C. A. SUMNERS,
419 Surety Bldg.,
Muskogee, Oklahoma,
CHESTER NORMAN,
CHAL WHEELER,
709 Manhattan Bldg.,
Muskogee, Oklahoma,
EDWIN LANGLEY,
247 Commercial National Bldg.,
Muskogee, Oklahoma,
Counsel for Petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

Joe McMullans, M. R. Edwards and E. W. Pate, *Petitioners*,

vs.

Kansas, Oklahoma and Gulf Railway Company, Incorporated; and Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association; and J. B. Farrell, Chairman, W. B. Moore, Vice-Chairman, and F. E. Daniel, Secretary of the Committee of the said Brotherhood of Locomotive Firemen and Enginemen, and as representatives of all of the employees of the class coming within the scope of the collective bargaining agreement between said Railway Company and the said Brotherhood, *Respondents*.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Joe McMullans, M. R. Edwards, and E. W. Pate pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the denial of an injunction demanded by the petitioners against the enforcement of a collective bargaining agreement.

Citations to Opinions Below.

The Opinion of the District Court (R. 26-30), printed in Appendix B hereto, *infra*, pp. 18-22, is reported in 129 F. Supp. 157. The Opinion of the Court of Appeals printed in Appendix B hereto, *infra*, pp. 23-31, is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 10, 1956 (Appendix B, *infra*, p. 22). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

1. Whether a railway company and the bargaining representative of certain of the employees of the company may enter into a valid collective bargaining contract for the compulsory retirement of such employees at the age of 70 years.

2. Whether a bargaining representative elected under the provisions of the Railway Labor Act is required to give notice to the railroad employees represented, and an opportunity to be heard, before entering into an agreement with their employer which results in termination of employment by reason of age.

Statutes Involved.

The statutory provisions involved are Section 2 of the Railway Labor Act, 44 Stat. 577, 45 U. S. C., Section 152 First; Part I, Section 1 of the Railroad Retirement Act, 50 Stat. 309, 45 U. S. C., Section 228b, (a) and (b), and the Railroad Retirement Tax Act, 53 Stat. 179, 180, 26 U. S. C., Sections 1500 and 1520. They are printed in Appendix A, *infra*, pp. 13-17.

Statement.

The petitioners herein applied for an injunction to prevent the carrying out of the terms of an agreement between their employer and their bargaining representative which had the effect of terminating their employment. The jurisdiction of the District Court was invoked because the case arises under the Railway Labor Act as amended, 44 Stat. 577; 45 U. S. C., Ch. 8, Sec. 151, *et seq.*, and is an action of which such courts are given original jurisdiction. 62 Stat. 931; 28 U. S. C., Sec. 1337.

Joe McMullans, M. R. Edwards and E. W. Pate are locomotive engineers employed by the Kansas, Oklahoma and Gulf Railway Company which is engaged in interstate commerce. At an election held between November 27 and December 3, 1953, under the supervision of the National Mediation Board and according to the provisions of the Railway Labor Act, the Brotherhood of Locomtive Firemen and Enginemen, Local Number 488, a labor union, won the right to represent as bargaining agent the engineers employed by the company by a vote of 16 to 12, all eligible engineers voting (R. 132). The Board issued its Certificate to the union under date of January 27, 1954 (R. 141). Prior to that time the engineers had been represented by the Brotherhood of Locomotive Engineers, Division No. 853 (R. 85). Both firemen and engineers are eligible for membership in the Brotherhood of Locomotive Firemen and Enginemen. (R. 50)

Five months later, on June 27, 1954, at a meeting of the Brotherhood of Locomotive Firemen and Enginemen, Local No. 488, which only members were allowed to attend, with 18 out of a total of 36 members present (R. 156), 9 of whom were engineer members, the form of a proposed agreement

with the railroad company for compulsory retirement at 70 of firemen and engineers was adopted, and the following day, June 28, 1954, the agreement was executed by proper officials of the railroad company and the union (R. 133). The pertinent part of the agreement reads as follows (R. 133):

> "The parties hereto have mutually agreed that all employees coming within the scope of agreements between the parties who have attained the age of 70 or who shall attain the age of 70 before November 1, 1954, shall be retired from railway service covered by agreements between these parties on October 31, 1954.
>
> "Employees who shall attain the age of 70 after October 31, 1954, shall be required to retire from railway service covered by agreements between these parties on the last day of the calendar month in which they attain the age of 70."

Shortly after its execution notice of the agreement was mailed to each engineer employed by the railroad company, including the petitioners herein (R. 49, 50). Although there had been rumors that such an agreement was proposed, and on June 24, 1954, the petitioner Joe McMullans and the Chief Engineer, Brotherhood of Locomotive Engineers, Div. 853, had made protest to a company official against it (R. 68), this was the first formal notice concerning the agreement received by the petitioners (R. 49, 59, 61). No opportunity to be heard on the matter was afforded the engineers other than those who were members of the Firemen and Enginemen's union. (R. 51)

All three of the petitioners were 70 years of age or older at the time the agreement was negotiated, and on October 1, 1954, they were notified by the railroad company of the termination of their services pursuant to the agreement,

effective October 31, 1954 (R. 49). On October 12, 1954, they filed suit to enjoin the application of the terms of the agreement to them (R. 3). The District Court sustained the validity of the agreement and denied the injunction (Appendix B, p. 19, *infra*), holding that the Congress has not and cannot enter the field of compulsory retirement legislation, that such field is a proper one for private agreement, and that the petitioners and others represented by their bargaining representative were not entitled to notice prior to the execution of the agreement (Appendix B, p. 20, *infra*). The Court of Appeals affirmed the judgment of the District Court on the same grounds. (Appendix B, p. 22, *infra*.)

Reasons for Granting the Writ.

1. Whether railway companies and representatives of railway workers may by contract fix the retirement age of employees is a question which involves the rights of a great many people in a great industry. Similar agreements to the one here under consideration have been made by other railway companies and crafts of employees (R. 161-162) and it is reasonable to assume still others may contemplate such agreements. The petitioners and others similarly affected by this and like contracts are being forced into retirement, in many instances, surely, against their wishes. And that a substantial doubt exists in the minds of many railroad employees that they are being validly deprived of their jobs is demonstrated at least in some measure by the fact that such contracts have been questioned in widely separated sections of the country, in the cases of *Boget* v. *Chicago & Northwestern Railroad Co.*, No. 51 C 902 N. D. I. 11, not reported; *Goodin* v. *Clinchfield Railroad Company*, 125 F. Supp. 441 (Tenn., 1954); *Lamon* v. *Georgia Southern and Florida Railway Company*, decided November 14, 1955,

(Georgia) and not yet reported and the case at bar. While in each of these instances the contract has been held valid, we believe the question is of such vital importance to so many people it should be resolved by this Court.

Further, there is raised in this case the additional question of whether employees not members of the organization serving as their bargaining representative are entitled to notice and an opportunity to be heard before such a contract is made. The question is of general importance for the reason that it pertains to the duty owed by a representative for collective bargaining purposes to the employees represented; a determination of whether such representatives may act on matters vital to the people they represent without consulting them.

2. The judgment of the court below is erroneous, we believe, in that an adequate distinction is not made between the law relating to the railroad industry and the law relating to other industries engaged in interstate commerce. The Railway Labor Act, 45 U. S. C. 152, authorizes collective bargaining concerning "rates of pay, rules and working conditions. In holding that the bargaining language of the National Labor Relations Act, 29 U. S. C. 141, *et seq.*, which reads "rates of pay, wages, hours of employment, or other conditions of employment," was sufficiently broad to authorize bargaining concerning retirement between an employer and employees in the steel industry, the court in *Inland Steel Co.* v. *NLRB,* (7th Cir.) 170 F. 2d 247, 12 A. L. R. 2d 240, certiorari denied 336 U. S. 960, pointed out that a comparison of the language of the two acts shows that in the National Labor Relations Act Congress "must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act." Far more significant

than the difference in the bargaining language of the two Acts, however, we think, is the fact that for the railroad industry Congress enacted the Railroad Retirement Act, 45 U. S. C. 228 (b), and the Railroad Retirement Tax Act, 26 U. S. C. 1500, *et seq.* Together they provide a complete and comprehensive system of retirement with pay for railroad employees and the means of financing it. In no other industry is this true. Where others are free to agree with their employers on a retirement plan for themselves if they can, and to establish by agreement the terms and conditions under which they shall become entitled to its benefits, the field is closed to railroad employees. These acts provide a uniform retirement plan for the entire railroad industry and have the effect of precluding the establishment of a variety of plans which different companies and their employees might otherwise agree on. Why this should be considered desirable for the railroad industry and not for other industries is not a matter we feel is appropriate here for discussion. The fact is that such conclusion was reached and acted upon by the Congress. And what is sought now to be accomplished by the respondents in this case is a modification by private agreement of a legislative enactment which contains no provision for such amendment.

The Railroad Retirement Act of 1934, 48 Stat. 1283, set up a pension and retirement system for railroad employees in great detail including a provision for compulsory retirement at the age of 70. This provision and many others were held unconstitutional by this court in *Railway Retirement Board* v. *Alton Railroad Company,* 295 U. S. 330. A new act was passed in 1935, 49 Stat. 967, which left out the 70-year retirement provision but provided that an employee annuity would be reduced by one-fifteenth for each year the

employee worked past the age of 65. This was declared unconstitutional by *Alton Railroad Company* v. *Railroad Retirement Board,* 16 F. Supp. 955. The present Railroad Retirement Act passed in 1937, 45 U. S. C. 228 (b), omitted this latter provision and substituted a provision that provided that an employee would not be given credit on his annuity for any employment rendered after attaining the age of 65. This latter provision was eliminated by Act of Congress of October 30, 1951, Section 7, 65 Stat. 684, and at the present time there is no penalty invoked against employees who work past the age of 65 and no inducement is given by legislation for employees to retire at any age. It cannot be said, therefore, that the Congress did not have under consideration when it passed the Railroad Retirement Act in its present form the matter of retirement age. That it did nothing to authorize by private agreement what this Court said in the *Alton Railroad Company* case, *supra,* that it could not do itself, that is, fix a compulsory retirement age, we believe clearly signifies that the Congress did not intend to do so. The court below takes the view that because the Congress is limited in this respect the matter of age of retirement is left for private agreement. We urge, however, that such a limitation on the authority of Congress in no manner constitutes a limitation on its occupancy of the field. When it is considered that an obvious objective of the Railroad Retirement Act and the Railroad Retirement Tax Act was uniformity throughout the industry, it is apparent that leaving the age of retirement for private agreement could not have been intended. To do so would be to invite disruption of uniformity, not only between companies but between crafts employed by the same company.

It is our position that as long as Congress controls the matter of railroad retirement and pensions others may have

nothing to say about it. Otherwise there would soon be a variety of retirement systems arise in the nation's railroads and even on the same railroad as the court below ruled that the subject of compulsory retirement for railroad employees was solely a matter for the determination of the carrier and bargaining representative. Obviously if these two parties may by contract, decree that able-bodied men whose work has been satisfactory must retire at age 70 they can with equal validity require them to retire at age 60 or 45. *Inland Steel Co.* v. *NLRB,* (7th Cir.) 170 F. 2d 247. We think it fundamental that Congress intended a uniform nationwide retirement program for railway employees. The decision of the court below permits the carrier and bargaining representative to set the age of retirement, thus manifestly encroaching and nullifying the provisions of the Railroad Retirement Act that permits an employee to work as long as he is physically and mentally able to do so. Certainly the contested agreement was intended to accomplish something not found or authorized by the Railroad Retirement Act. Otherwise there would have been no point in making the agreement. Certainly Congress did not intend that railroad employees on one railroad, or in one craft on the same railroad, should be forced to retire at age 70 or some other age selected by the carrier and bargaining agent while on other railroads or in other crafts on the same railroad employees were permitted to work as long as physically and mentally able to do so.

We believe further that the lower court was in error in holding that the petitioners were not entitled to notice of the contemplated contract and an opportunity to be heard on it. As the court said in *Graham* v. *Southern Ry. Co.,* 74 F. Supp. 665 (D. C.), "A bargaining agent under the National Labor Relations Act or under the Railway Labor Act

is but an agent for a principal, and not an independent contractor. His principal is the entire group of employees whom the agent represents." This case was affirmed by this court, 338 U. S. 232. Here the lower court apparently overlooks the fact that many of the persons represented as bargaining agents by the Brotherhood of Locomotive Firemen and Enginemen, Local No. 488, were not members of that organization and not allowed to attend its meeting. Those who were members were given a hearing; those who were not members were not given a hearing. This, we think, constitutes a failure on the part of the bargaining representative to represent all of the members of the craft—in other words, discrimination. This Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, held that non-union members of a craft who were to be adversely affected by a proposed collective bargaining agreement were entitled to notice and an opportunity to be heard upon the proposed action. The non-union members who were being separated from their employment by the agreement in that case were negroes. Here they were men who had attained the age of 70, but they too were being separated from their employment by the proposed agreement and it would seem that they, like the negroes in the *Steele* case were entitled to notice and an opportunity to be heard. We think the court below departed from the rule regarding notice and an opportunity to be heard under such conditions as existed in the *Steele* case and existed in the present case.

Conclusion.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX A.

STATUTES INVOLVED.

45 U. S. C. 152, First:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

45 U. S. C. 228b, (a) and (b):

"(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in Section 228a (a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

"1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

"2. Women who will have attained the age of sixty and will have completed thirty years of service.

"3. Individuals who will have attained the age of sixty and will have completed thirty years of service, but the annuity of such an individual shall be reduced by one one-hundred-and-eightieth for each calendar month that he is under age sixty-five when his annuity begins to accrue.

"4. Individuals having a current connection with the railroad industry, and whose permanent physical or mental

condition is such as to be disabling for work in their regular occupation, and who (i) will have completed twenty years of service or (ii) will have attained the age of sixty. The Board, with the cooperation of employers and employees, shall secure the establishment of standards determining the physical and mental conditions which permanently disqualify employees for work in the several occupations in the railroad industry, and the Board, employers, and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. An individual's condition shall be deemed to be disabling for work in his regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established; if the employee will not have been so disqualified by his employer, the Board shall determine whether his condition is disabling for work in his regular occupation in accordance with the standards generally established; and, if the employee's regular occupation is not one with respect to which standards will have been established, the standards relating to a reasonably comparable occupation shall be used. If there is no such comparable occupation, the Board shall determine whether the employee's condition is disabling for work in his regular occupation by determining whether under the practices generally prevailing in industries in which such occupation exists such condition is a permanent disqualification for work in such occupation. For the purposes of this section, an employee's 'regular occupation' shall be deemed to be the occupation in which he will have been engaged in more calendar months than the calendar months in which he will have been engaged in any other occupation during the last preceding five calendar years, whether or not consecutive, in each of which years he will have earned wages or salary, except that, if an employee establishes that during the last fifteen consecutive calendar years he will have been engaged in another occupation in one-half or more of all the months in which he will have earned wages or salary,

he may claim such other occupation as his regular occupation; or

"5. Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

"Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for in paragraphs 4 or 5 of this subsection and of the continuance of such disability (according to the standards applied in the establishment of such disability, until the employee attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the continuance of the disability until he attains the age of sixty-five years, his right to an annuity by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraphs 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him.

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply

to the individuals mentioned in sub-divisions 4 and 5 of subsection (a) of this section prior to attaining age sixty-five."

26 U. S. C. 1500:

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation, paid to such employee after December 31, 1956, for services rendered by him after such date, as is not in excess of $300 for any calendar month before July 1, 1954, and as is not in excess of $350 for any calendar month after June 30, 1954:

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 5¾ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. 53 Stat. 179, amended July 31, 1946, c. 709, Sec. 3(a), 60 Stat. 723; Aug. 31, 1954, c. 1164, Pt. II, Sec. 201, 68 Stat. 1040."

26 U. S. C. 1520:

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation, paid by such employer after December 31, 1946, for services rendered to him after December 31, 1936, as is, with respect to any employee for any calendar month before July 1, 1954, not in excess of $300 and for any calendar month after June 30, 1954, not in excess of $350: * * *

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 5¾ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. 53 Stat. 180, amended July 31, 1946, c. 709, Sec. 3(d), 60 Stat. 724; Aug. 31, 1954, c. 1164, Pt. II, Sec. 204, 68 Stat. 1040."

APPENDIX B.

Judgments and Opinions of Courts Below.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

Civil Action No. 3845.

Joe McMullans, et al., Plaintiffs,

vs.

Kansas, Oklahoma and Gulf Railway Company, Incorporated, et al., Defendants.

DECREE.

The above-entitled cause was duly tried on its merits, November 30, 1954, before the Honorable W. R. Wallace, District Judge. On February 10, 1955, the said Judge filed herein his memorandum opinion setting forth his Findings of Fact and Conclusions of Law in favor of the defendants;

It Is, Therefore, by the Court Ordered, Adjudged and Decreed that the prayer of the plaintiffs herein for a permanent injunction be, and the same is hereby in all respects denied, and this action is hereby dismissed with prejudice, and that the defendants recover their costs herein.

Dated this 24 day of February, 1955.

W. R. WALLACE,
United States District Judge.

Filed Feb. 24, 1955; John H. Pugh, Clerk U. S. District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 3845 Civil.

Joe McMullans, M. R. Edwards, and E. W. Pate, Plaintiffs,

vs.

Kansas, Oklahoma and Gulf Railway Company, Incorporated; and Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association; and J. B. Farrell, Chairman, W. B. Moore, Vice Chairman, and F. E. Daniel, Secretary, of the Committee of the said Brotherhood of Locomotive Firemen and Enginemen, and as representatives of all of the employees of the class coming within the scope of the collective bargaining agreement between the said railway company and the said brotherhood, Defendants.

Filed Feb. 10, 1955; John H. Pugh, Clerk U. S. District Court.

MEMORANDUM OPINION.

The plaintiffs, locomotive engineers employed by the defendant, Kansas, Oklahoma and Gulf Railway Company, incorporated (herein referred to as Carrier), brings this action to gain a permanent injunction aaginst all the defendants to prevent the enforcement of an "Agreement" entered into between said Carrier and the defendant, Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association (herein referred to as Enginemen).[1] The contested agreement provides for compulsory retirement of locomotive engineers upon reaching the age of 70 years. Plaintiffs, although admitting that the Enginemen Association was the duly authorized bargaining representative for the plaintiff engineers at the time of the execution of said agreement,[2] urge that the agree-

1. Plaintiffs are members of the Brotherhood of Locomotive Engineers, Div. No. 853, Muskogee, Oklahoma; and, all are over the age of 70.

2. Defendant Enginemen Association has been the bargaining representative of the locomotive engineers employed by said Carrier since December 21, 1953. The agreement was signed June 28, 1954.

ment is invalid because: (1) The agreement was made without the giving of notice to plaintiffs as required by statute;[3] (2) The Enginemen Association breached its fiduciary relationship with the locomotive engineers by discriminating against the engineers in requiring retirement the purpose of which discrimination was to make jobs available for those having less seniority;[4] (3) agreement directly conflicts with express provisions of the Railway Retirement Act;[5] and, deals with a subject which is not a proper object for collective bargaining.[6]

This Court issued a temporary injunction forestalling the immediate enforcement of the contested agreement, conducted a hearing on the merits and took the case under advisement.

After carefully reading the briefs submitted by counsel the Court has concluded that the instant agreement is valid

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3. Plaintiffs assert that 45 U. S. C. A., Section 156, was applicable to the agreement in question in that such section provides in part: "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, • • •." See also 45 U. S. C. A. 152 Seventh. Plaintiffs also rely upon Art. 77 of the original Articles of Agreement between the Engineers and the defendant Railroad, dated March 1, 1925.

4. Plaintiffs rely upon the principle announced in *Graham, et al., v. Southern Railway Co., et al.*, 74 F. Supp. 663, 664 (D. C. D. C., 1947), affirmed 338 U. S. 232: "• • • An agent is a fiduciary. If the principal is a group of individuals, this obligation extends to each member of the group. The agent is bound to represent the interest of each member of the group fairly and with equal zeal. He may not neglect some of the members, prefer some as against others, or discriminate among them. He may not advance the interests of some to the prejudice of others. This is implicit in the fiduciary relationship that exists between every agent and his principal, be that principal a single individual or a group of individuals." See also *Piercy v. Louisville & Nashville Railway Company*, 198 Ky. 477, 248 S. W. 1042 (1923).

5. See 45 U. S. C. A. 228b.

6. On this point plaintiffs urge that inasmuch as Congress has chosen, under the interstate commerce clause, to legislate in regard to retirement, annuities and pensions, such legislation amounts to a withdrawal of the issue of compulsory retirement from the field of private contract. Cf. *Brotherhood of Railroad Shop Crafts, Grand Lodge No. 3, v. Lowden, Trustee*, 86 F. 2d 458 (C. A. 10, 1936).

and that the plaintiffs are not entitled to a permanent injunction prohibiting the contract's operation. The following conclusions are given in support of the Court's ruling:

1. The Court has jurisdiction over the parties and over the subject matter of the suit.[7]

2. Under the law the plaintiffs (or the Brotherhood of Locomotive Engineers) were not entitled to notice prior to the execution of the agreement in question inasmuch as defendant Enginemen Association was the duly authorized bargaining representative for the engineers at the time of the making of the agreement; and, the agreement, as between the contracting parties, that is, the Carrier and the Enginemen Association, was amicably agreed upon.[8]

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7. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944); *Boget, et al.*, v. *Chicago and North Western Railroad Company*, (unreported) D. C. Ill., N. D., E. Div., No. 51 C 902 (1951). See also 28 U. S. C. A., Sec. 1337; and, 45 U. S. C. A., Sec 151, *et seq.*

8. As observed in *Walker, et al.*, v. *Pennsylvania-Reading Seashore Lines, et al.*, 61 A. 2d 453, 466 (1948): "It is quite apparent that sections 152-156, having in mind the general purposes of the Act, contemplated the amicable settling of disputes between the employer and the bargaining agent. The provisions therein contained for notice and conference and intervention of the Mediation Board demonstrates clearly the anticipation of a possible dispute between the employer and the employee. It is the expressed desire and stated public policy of the statute to peacefully settle such disputes to avoid 'any interruption to commerce.' The general purposes of the Act are attained and do result if an original agreement of employment or a modification of an existing agreement are amicably arrived at by the parties thereto. If such a situation arises there is, of course, no excuse or reason for a notice or conference. The notice required under the statute is to be given to the representative of the employees and not to the employees themselves and no needful purpose could be served to require such notice where there was no controversy between employer and employee. Under the circumstances here present, these provisions may be expressly waived by the parties. The complainants, therefore, cannot be heard to complain that no such notice was given to their legally constituted representative, who patently waived the same. It would, in such circumstances, be needless and ridiculous to require notice to the bargaining agent where there was a peaceful conclusion of negotiation, without any dispute as contemplated by the statute." See also, *Goodin, et al.*, v. *Clinchfield Railroad Company, et al.*, 27 Labor Cases 68, 906 (D. C. Tenn., E. D. N. Div., Civ. No. 891, 1954).

3. The agreement does not discriminate against any special class or minority but equally affects all persons covered by the agreement. Although each person will be affected at a different time the impact upon all persons involved is the same.[9]

4. The agreement is not in conflict with express provisions of the Railway Retirement Act.[10]

5. The subject matter of the agreement in question is a proper object of collective bargaining and has not been taken over by express legislation enacted by Congress.[11]

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9. Thus the instant case is distinguishable from that line of authority relied upon by plaintiffs headed up by the case of *Graham, et al.*, v. *Southern Railway Co., et al.*, fn. 4, *supra*, wherein the Supreme Court in Syllabus 3 (b) stated: "The Railway Labor Act imposes upon an exclusive bargaining representative the duty to represent all members of the craft *without racial discrimination* and federal courts at the suit of a racial minority of the craft will enforce that duty. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Firemen*, 323 U. S. 210." (Emphasis supplied.) Read *Colbert, et al.*, v. *Brotherhood of Railroad Trainmen, et al.*, 206 F. 2d 9, 12 (C. A. 9, 1953); *Goodin, et al.*, v. *Clinchfield Railroad Company, et al.*, fn. 8, *supra; Boget, et al.*, v. *Chicago and North Western Railroad Company*, fn. 7, *supra.*

10. Congress has not entered the field of compulsory retirement legislation and such field is a proper object of private agreement. The case of *Railroad Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330 (1935), holding that Congress has no authority to compel involuntary retirement under the interstate commerce clause has no bearing on the issue in the instant case dealing with the right of private parties to contract, other than to emphasize that Congress has not (and cannot) enact such legislation. The issue of compulsory retirement must be sharply distinguished from legislation dealing with pensions and annuities at the time of retirement.

11. As stated in *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 252 (C. A. 7, 1949): "We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, particularily a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case, the effect upon the 'conditions' of the persons employment is terminated, and we think in either case, the effected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination." Read *Goodin, et al.*, v. *Clinchfield Railroad Company, et al.*, fn. 8, *supra;* and, *Boget, et al.*, v. *Chicago and North Western Railroad Company*, fn. 7, *supra.*

The defendants are entitled to judgment. Counsel should submit a journal entry which conforms with this opinion within fifteen days.

Dated this 10th day of February, 1955.

W. R. WALLACE,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 3845 Civil.

Joe McMullans, M. R. Edwards, and E. W. Pate, Plaintiffs,

vs.

Kansas, Oklahoma and Gulf Railway Company, Incorporated; and Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association; and J. B. Farrell, Chairman, W. B. Moore, Vice Chairman, and F. E. Daniel, Secretary, of the Committee of the said Brotherhood of Locomotive Firemen and Enginemen, and as representatives of all of the employees of the class coming within the scope of the collective bargaining agreement between the said railway company and the said brotherhood,

Defendants.

JUDGMENT.

Thirty-fifth day, November Term, Tuesday, January 10th, 1956.

Before Honorable Orie L. Phillips, Chief Judge, and Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 5153 — November Term, 1955.

Joe McMullans, M. R. Edwards and E. W. Pate, Appellants,

v.

Kansas, Oklahoma and Gulf Railway Company, Incorporated; and Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor association; and J. B. Farrell, Chairman, W. B. Moore, Vice-Chairman, and F. E. Daniel, Secretary of the Committee of the said Brotherhood of Locomotive Firemen and Enginemen, and as Representatives of all of the Employees of the Class coming within the scope of the collective bargaining agreement between the said Railway Company and the said Brotherhood, Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Filed, United States Court of Appeals Tenth Circuit, Jan. 10, 1956; Robert B. Cartwright, Clerk.

[OPINION.]

Edwin Langley and Chal Wheeler (Chester Norman was with them on the brief), for appellants.

James D. Gibson, for Kansas, Oklahoma & Gulf Railway Company. Harold C. Heiss (Harold R. Shoemake was with him on the brief), for Local No. 488 of Brotherhood of Locomotive Firemen and Enginemen and the individual appellees, for appellees.

Before Phillips, Chief Judge, and Murrah and Pickett, Cir- Judges.

PICKETT, Circuit Judge:

The plaintiffs are able-bodied locomotive engineers over the age of seventy years with regular runs on the defendant railroad. They brought this action to restrain enforcement

of a provision in a collective bargaining agreement requiring compulsory retirement at the age of seventy. The challenged provision of the contract provides that, "* * * all employees coming within the scope of agreements between the parties who have heretofore attained the age of 70 or who shall attain the age of 70 before November 1, 1954, shall be retired from railway service covered by agreements between these parties on October 31, 1954." The District Court denied the plaintiffs any relief. 129 F. Supp. 157.

The material facts are not in dispute. The members of two labor organizations are involved, the Brotherhood of Locomotive Enginers, known as the B. L. E., and the Brotherhood of Locomotive Firemen and Enginemen, called the B. L. F. & E. The craft concerned herein are locomotive firemen and engineers operating locomotives on the defendant railroad. The engineers are eligible for membership in either the B. L. E. or the B. L. F. & E. Two of the plaintiffs were members of the B. L. E., and the third was a member of the B. L. F. & E. The basic agreement between the railroad and the craft has been in existence since March 1, 1925. At an election held under the auspices of the National Mediation Board, the B. L. F. & E. was designated to represent the craft for the purposes of the Railway Labor Act and was duly certified. Prior to the agreement on the disputed provisions of the contract, there was considerable discussion among the engineers concerning the proposal for compulsory retirement, and it was generally known that such an agreement was "in the making." No formal notice of the proposed provisions was given the B. L. E., or individually to the plaintiffs. At a regular meeting of the B. L. F. & E., the provision was unanimously approved and the contract was signed. Shortly thereafter, members of the craft were furnished copies of the contract and the plaintiffs were notified by the railroad that they would be retired on the specified date.

It is first contended that compulsory retirement of railroad workers is not a proper subject for collective bar-

gaining under the Railway Labor Act. 45 U. S. C. A., Sec. 152, First, requires the railroads to exert every reasonable effort to make and maintain agreements "concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." The plaintiffs say that compulsory retirement is not referred to in the Act, and that it does not fall within the provision concerning rates of pay, rules or working conditions.

Collective bargaining agreements creating a seniority system do not create a permanent status or give an indefinite tenure to employees. *Elder* v. *New York Central R. Co.*, 6th Cir., 152 F. 2d 361; *System Federation No. 59 of Railway Employees* v. *Louisiana & A. Ry. Co.*, 5th Cir., 119 F. 2d 509, 515, cert. den. 314 U. S. 656. Seniority among railroad employees is contractual and does not arise from mere employment. *Colbert* v. *Brotherhood of Railroad Trainmen*, 9th Cir., 206 F. 2d 9, cert. den. 346 U. S. 931. Those who acquire seniority rights under a contract are bound by the possibility that the contract may be changed, and the rights thereunder revised or abrogated. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Lewellyn* v. *Fleming*, 10th Cir., 154 F. 2d 211, cert. den. 329 U. S. 715; *Elder* v. *New York Central R. Co., supra; Lamon* v. *Georgia Southern and Florida Railway Co.*, ... Ga. ..., ... S. E. 2d ..., decided November 14, 1955. Employees have no vested right in the seniority created by contract and the Railway Labor Act does not undertake to guarantee them a job for life. The employer has the right to select employees and to discharge them, so long as the collective bargaining processes are not impaired. *Beeler* v. *Chicago, R. I. & P. Ry. Co.*, 10th Cir., 169 F. 2d 557, cert. den. 335 U. S. 903; *Lamon* v. *Georgia Southern and Florida Railway Co., supra.* A myriad of matters arising out of the employer-employee relationship are negotiated, although they are not specifically referred

to in the bargaining language of the Act.[1] Seniority and nondiscriminatory discharge, along with wages, are fundamentally contractual and are the most common subjects of bargaining. If seniority and nondiscriminatory discharges could not have been negotiated, then the employing railroad would have been at liberty to discharge the plaintiffs at will, or eliminate their seniority which was retained by virtue of the basic contract provisions and under which they now claim the right to work.

The statute places upon the bargaining representative the obligation to represent all those employees within the craft which it represents, and not just the majority which elected it. It must make an honest effort to serve the interests of all of them without discrimination. *Ford Motor Co.* v. *Huffman, supra; Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Lewellyn* v. *Fleming, supra.* But as the court said in the *Ford Motor* case, "complete satis-

1. Referring to this same contention in *Inland Steel Co.* v. *N. L. R. B.*, 7th Cir., 170 F. 2d 247, cert. den. in part 336 U. S. 960, and judgment affirmed in part, 339 U. S. 382, the Court of Appeals said:

"A few of such matters are: a provision agreeing to bargain concerning nondiscriminatory discharges; a provision concerning seniority rights, with its far reaching effect upon promotions and demotions; a provision for the benefit of employees inducted into the military service; a provision determining vacation periods with pay; a provision concerning the safety and health of employees, including clinic facilities; a provision for inplant feeding, and a provision binding the Company and the Union to bargain, in conformity with a Directive Order of the National War Labor Board concerning dismissal or severance pay for employees displaced as the result of the closing of plants or the reduction in the working force following the termination of the war. None of these matters and many others which could be mentioned are referred to in the Act *'in haec verba,'* yet we think they are recognized generally, and they have been specifically recognized by the Company in the instant case as proper matters for bargaining and, as a result, have been included in a contract with the Union. Some of the benefits thus conferred could properly be designated as 'wages,' and they are all 'conditions of employment.' We think no common sense view would permit a distinction to be made as to the benefits inuring to the employees by reason of a retirement and pension plan."

faction of all who are represented is hardly to be expected," and contracts may be made which have unfavorable effects on some. *Steele* v. *Louisville & N. R. Co., supra; Lewellyn* v. *Fleming, supra.* The seniority principle necessarily adversely affects some employees, particularly the younger employees, but it has always been recognized as a proper subject for negotiation. We think the trial court was justified in concluding that the agreement was negotiated in good faith by the duly elected representative of the craft in accordance with the basic agreement and that the Act does not discriminate against any special class or minority.

In support of their contention that the bargaining representative negotiated solely for the benefit of employees with less seniority, and did not represent them without hostility and discrimination, the plaintiffs rely on such cases as *Steele* v. *Louisville & N. R. Co., supra; Wallace Corp.* v. *N. L. R. B.,* 323 U. S. 248; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768. Those cases are clearly distinguishable The bargaining agent in each of those cases sought by contract to eliminate certain employees from employment, either because they were negroes, or because of former membership in a union unsatisfactory to the employer. The compulsory retirement age provided for in the contract before us affects all persons covered by the agreement in exactly the same manner, but at a different time, while the provisions in the cited cases affected only certain individuals. *Lamon* v. *Georgia Southern and Florida Railway Co., supra.*

The question of the right to contract for compulsory retirement arose in *Inland Steel Co.* v. *N.L.R.B., supra.* It was there contended that under the National Labor Relations Act, compulsory retirement was not included in the bargaining provisions which referred to "rates of pay, wages, hours of employment, or other conditions of employment." 29 U. S. C. A., Sec. 159(a). The Court of Appeals of the Seventh Circuit in that case stated that it was convinced "that the language employed by Congress, consid-

ered in connection with the purpose of the Act, so clearly includes a retirement and pension plan as to leave little, if any, room for construction. While as the Company has demonstrated, a reasonable argument can be made that the benefits flowing from such a plan are not 'wages,' we think the better and more logical argument is on the other side, and certainly there is, in our opinion, no sound basis for an argument that such a plan is not clearly included in the phrase, 'other conditions of employment.' The language employed, when viewed in connection with the stated purpose of the Act, leads irresistibly to such a conclusion. And we find nothing in the numerous authorities called to our attention or in the legislative history so strongly relied upon which demonstrates a contrary intent and purpose on the part of Congress." It is urged that the bargaining language of the National Labor Relations Act is broader than that of the Railway Labor Act, and that for this reason the *Inland* case is not authority here. While there is some difference in the wording of the two provisions, we thing that they were intended to include substantially the same subjects. The Supreme Court of Georgia in *Lamon* v. *Georgia Southern and Florida Railway Co., supra,* in a well considered opinion squarely held that pensions and compulsory retirement were proper subjects of collective bargaining under the Railway Labor Act. We agree with the reasoning of the *Inland* and *Lamon* cases. The Act is remedial and should be broadly and liberally construed to accomplish the purposes it was designed to meet. *N.L.R.B.* v. *Metallic Bldg. Co.,* 5 Cir., 204 F. 2d 826, cert. den. 347 U. S. 911; *N. L. R. B.* v. *Knoxville Pub. Co.,* 6 Cir., 124 F. 2d 875; *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept., etc.,* 6 Cir., 93 F. 2d 340, cert. den. 303 U. S. 649; *Jeffery-De Witt Insulator Co.* v. *N.L.R.B.,* 4 Cir., 91 F. 2d 134, cert. den., 302 U. S. 731.

If the Act is construed as suggested by the plaintiffs, then, as we have said, the railroads could not be compelled to negotiate over nondiscriminatory discharge and seniority

rights. These matters are now generally controlled by negotiated contracts. We hold that the right to bargain for compulsory retirement is in the same category as the right to bargain and contract for wages, seniority and discharge of employees, and that it is authorized by the Railway Labor Act. *Boget* v. *Chicago and Northwestern Railway Company*, D. C., N. D. Ill., decided December 12, 1951; *Goodin* v. *Clinchfield Railroad Company*, D. C., E. D. Tenn., 125 Fed. Supp. 441; *Lamon* v. *Georgia Southern and Florida Railway Co., supra.*

It is suggested that with the enactment of the Railroad Retirement Act of 1937, 45 U. S. C. A. 228a, *et seq.*, Congress has preempted the field, and that when the Supreme Court held that Congress could not by statute constitutionally fix a retirement age, the parties could not legally contract on the subject. See *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330. This does not follow. There is nothing illegal or immoral about a contract for compulsory retirement. It is a principle now commonly accepted in industry and other lines of endeavor, including employees of the United States. 5 U. S. C. A., Sec. 715. It is closely akin to the right to negotiate for rules of discharge and seniority of employees. The Railroad Retirement Act does not purport to fix an age of compulsory retirement and Congress does not have the power. *Railroad Retirement Board* v. *Alton Railroad Co., supra.* It establishes a method for creating an annuity fund in which qualified employees may participate when employment has ceased by retirement or relinquishment of the right to continue in the service of the employer. 45 U. S. C. A., Sec. 228(b); *Boget* v. *Chicago and Northwestern Railway Company, supra.* A contract requiring retirement at a specified age does not in any way conflict with its provisions and there is no indication in the *Alton* case that compulsory retirement cannot be effectively negotiated by contract. The decision went no further than to say that the right to compel retirement does not lie within the orbit of Congressional power. *Alton R. Co.* v. *Railway Retirement Board*, D. C. D. C., 16 F. Supp. 955, 959.

Finally, the plaintiffs contend that the agreement was invalid because the required notice was not given to them and the B. L. E., and that the agreement deprives them of property rights in violation of the Fifth Amendment to the Constitution. These contentions are without merit. It is conceded that the B. L. F. & E. was the duly selected and certified bargaining agent for the craft including these these plaintiffs, with authority to contract with the railroad on matters relating to rates of pay, rules and working conditions. The Railway Labor Act requires railroads to "treat with" certified representatives of the employees and with no others. 45 U. S. C. A., Sec. 152, Ninth; *Virginian Railway Co.* v. *System Fed. No. 40,* 300 U. S. 515, 545, 548; *Lewellyn* v. *Fleming, supra.* In the *Lewellyn* case, it was stated that the Act "undoubtedly included the authority to prospectively contract with reference to seniority rights of the members of the craft, whether members of the union or not." The compulsory retirement provisions of the contract with which we are dealing are prospective, and are not retroactive in any respect. They do not affect rights already accrued. They seek to change existing terms of the contract and to apply those changes in the future. This, the bargaining agent has the power to do. *Elgin, J. & E. Co.* v. *Burley,* 325 U. S. 711, 739. The contractual provisions were for the collective interests of all the employees represented, even though some were adversely affected. Since the Railway Labor Act does not create a permanent status for employees or fix unlimited tenure in their jobs, there was no violation of the plaintiffs' Constitutional rights.

The bargaining agent is the representative of the craft and is not required to consult with the individual members or to give them notice of contemplated contractual actions within the scope of its authority. It has the authority to

bind its principal, if it acts within the statutory provisions. Section 6 of the Railway Labor Act has no application here. 45 U. S. C. A., Sec. 156.[3] This section requires the carriers and the bargaining representatives to give thirty days' notice of any intended changes in the agreements affecting pay, rules and working conditions, and to fix the time and place for the beginning of a conference between the representative of the carriers and the employees. Obviously, it is not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. Its purpose is to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract. *Childers* v. *Brotherhood of R. Trainmen*, 8 Cir., 192 F. 2d 956.

Affirmed.

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3. This section reads in part:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice."